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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANK BERRY, JR., Defendant and Appellant.	A098850 (Solano County Super. Ct. No. FC192045)

I.

INTRODUCTION

This is an appeal from a judgment and sentence following entry of a plea of no contest to a single count of causing bodily injury while driving under the influence of alcohol or drugs (Veh. Code, § 23153, subd. (a)). Appellant Frank Berry, Jr. principally contends on appeal that the trial court abused its discretion in ordering him to pay restitution of $5,400 to victim Harold Dronan and $18,000 to victim James Fry. Appellant also claims that, at the time of entering his plea, the trial court prejudicially failed to advise him that the payment of restitution was a direct consequence of that plea. We affirm.

II.

FACTS SURROUNDING THE PLEA AND SENTENCE

A four-count felony complaint was filed by the Solano County District Attorney's Office charging appellant with causing bodily injury while driving under the influence of alcohol or drugs (DUI) (Veh. Code, § 23153, subd. (a)—count I); driving under the

influence of alcohol (Veh. Code, § 23153, subd. (b)—count II); leaving the scene of an accident (Veh. Code, § 20001, subd. (a)—count III); and, driving when privileges are suspended for prior DUI (Veh. Code, § 14601, subd. (a)—count IV). As to counts I and II, the complaint also alleges that appellant had suffered three prior DUI convictions, two in 1997 and one in 1999.

After initially entering a plea of not guilty, appellant filed a change of plea form on January 8, 2002, in which he changed his plea to no contest as to count I. Among the rights waived as part of that plea, appellant acknowledged that he was giving up his right to appeal. It was also agreed that, in return for his plea as to count I, the remaining three counts alleged in the complaint would be dismissed. Further, if appellant was not amenable to probation, he could withdraw his no-contest plea. The matter was put over to January 29, 2002, for judgment and sentencing, and a presentence probation report was ordered. Because the probation report was received late, the matter was again continued to February 26, 2002.

In the meantime, appellant filed a motion to withdraw his no contest plea. The hearing on this motion was held on February 26, at which time appellant also made a *Marsden* motion seeking substitute counsel (*People v. Marsden* (1970) 2 Cal.3d 118). Both motions were denied. However, at the hearing the trial judge indicated that, as a result of having read the probation report, it was his intention to sentence appellant to state prison, and not to grant probation as he had originally indicated. Accordingly, under the plea agreement, the court continued judgment and sentencing for an additional week to allow appellant to decide whether he wished to withdraw his no contest plea.

After another continuance, the matter finally came on for judgment and sentencing on March 19, 2002. At that time, appellant indicated no desire to withdraw his plea, and he was sentenced to the midterm of three years in state prison on count I. He was also ordered to pay restitution of $5,400 to victim Harold Dronan and $18,000 to victim James Fry. The only objection raised by defense counsel to the restitution order was that defendant was unable to pay the amounts ordered (Pen. Code, § 1202.4, subd. (d)).[1]

[1] All further undesignated statutory references are to the Penal Code.

An application for probable cause was made by appellant in pro. per. on April 22, 2002, which was denied on May 20, 2002. This timely appeal followed.

III.

DISCUSSION

A. *No Abuse of Discretion in Ordering Restitution*

Section 1202.4, subdivision (f), provides that in "every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." The subdivision makes the award of victim restitution mandatory unless the court finds "compelling and extraordinary reasons for not doing so, and states them on the record." Subdivision (f)(1) provides, in part, that a criminal defendant is entitled to a hearing before a judge to dispute the determination of the amount of restitution. The amount of restitution for damaged property shall be the replacement cost of the property or the actual cost of repairing the property when repair is possible. (§ 1202.4, subd. (f)(3)(A).)

In this case, the probation report set forth the basis for the victim restitution ordered. It noted that appellant struck two vehicles on the evening of April 9, 2001.[2] One of these vehicles was a 1989 Chevy conversion van owned by Harold Dronan, which he had purchased the week before the collision for $5,400. That vehicle was totaled. The other vehicle was a tractor-trailer owned by victim James Fry, who estimated that it would take *at least* $18,000 to repair it. Mr. Fry also indicated that, as of the date he was interviewed by the probation department (sometime after the referral was received by the

[2] Because the only factual issue raised on appeal relates to restitution, we have omitted a recitation of facts relating to the accident itself, appellant's intoxication, and the factual basis for the plea generally.

probation department on March 1, 2002), he was still unable to use the trailer and was losing $10,000 per month because it was inoperative.[3]

We note initially that no objection to the determination of the amount of restitution was made by appellant, and thus the issue was waived. (*People v. Foster* (1993) 14 Cal.App.4th 939, 944.)

Notwithstanding appellant's waiver, we conclude that the court did not abuse its discretion in ordering restitution. First, the trial court has a right to rely on the probation report for evidence as to the amount of restitution. (*People v. Foster*, *supra*, 14 Cal.App.4th at p. 946.) Second, the owner's statement as to value of property is prima facie evidence of value for purposes of setting restitution, and the responsibility to contest the owner's statement rests with the defendant. (*Ibid.*) As noted, no objection was made to the order of restitution other than defense counsel's claim that defendant was unable to pay, an issue not raised on appeal. No objection was made to the court's obvious reliance on the values given by the owners of the damaged vehicles, and no suggestion was made that the court was required to demand the presentation of documents to substantiate the losses claimed.

On this record we have no difficulty whatsoever concluding that there was no abuse of discretion by the trial court is setting the amounts of victim restitution ordered.

B. ***No Violation of Appellant's Fundamental Due Process Rights In Assessing Victim Restitution***

Appellant acknowledges that section 1202.4, subdivision (g), requires the assessment of victim restitution without regard to a criminal defendant's ability to pay.[4]

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[3] We omit any references to the possibility of insurance paying for damage to either victim because, by statute, such matters shall not affect the amount of restitution ordered. (§ 1202.4, subd. (f)(2).)

[4] Section 1202.4, subdivision (g), provides: "The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. *A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of a restitution order.*" (Italics added.)

However, he contends that the statute, as applied, violates the "fundamental fairness doctrine of the Fourteenth Amendment."

First, we note that no objection was made below raising this constitutional argument, thus it is waived. (See *People v. Raley* (1992) 2 Cal.4th 870, 892 [failure to object specifically on due process grounds constitutes a waiver].) Second, victim restitution is not considered punishment for the crime committed, but instead is an award of compensation no different from the relief a victim could obtain from the defendant in a civil action. Thus, constitutional protections afforded imposition of criminal sanctions are not implicated. (See *People v. Harvest* (2000) 84 Cal.App.4th 641, 650 [doctrine of double jeopardy does not apply to imposition of victim restitution].)

Third, and finally, despite the statutory requirement precluding consideration of appellant's ability to pay, were it constitutionally required, there was evidence supporting the conclusion that appellant had the ability to pay. From October 2000, and up to the time of his incarceration, appellant had been working for Pride Industries at Travis Air Force Base. At sentencing, the court concluded that appellant "can get a job and pay these people back." Thus, there was a "factual and rational basis" from which the court could conclude an ability to pay, albeit perhaps over time. (*In re Brian S.* (1982) 130 Cal.App.3d 523, 532.)

C. *No Violation of Appellant's Rights to be Advised of Penal Consequences of Plea*

Alternatively, appellant contends that his constitutional right to be advised of the penal consequences of his plea was violated because the court did not advise him of his exposure to an order of victim restitution. We agree with respondent that the issue is not cognizable on appeal because appellant did not obtain a certificate of probable cause, as required by section 1237.5. Section 1237.5 requires that a criminal defendant may not appeal from a judgment of conviction upon a plea of no contest unless *both*: "(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings," and "[¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." (§ 1237.5.)

The failure to obtain a certificate of probable cause subjects the appeal to dismissal. (*People v. Panizzon* (1996) 13 Cal.4th 68, 89-90.) As respondent correctly points out, a challenge going to the validity of the plea, rather than to the sentencing pursuant to that plea, requires a certificate of probable cause. (*People v. McNight* (1985) 171 Cal.App.3d 620, 624.) We have entertained appellant's challenge to the court's restitution order because it clearly arises out of appellant's sentencing. However, appellant's alternative claim that he was not properly advised of his exposure to restitution generally when his no-contest plea was accepted is, in substance, a challenge to the validity of the plea. This claim suggests that the plea itself is invalid. Indeed, the very relief appellant seeks now is for us to set aside the judgment so he can withdraw his plea.

We note that appellant filed an application for a certificate of probable cause, evidently acknowledging both his familiarity with this requirement and the need for such in this instance, but it was denied by the trial court. This decision, if erroneous, should have been challenged on appeal by writ of mandamus rather than direct appeal or by habeas corpus petition. (*People v. Castelan* (1995) 32 Cal.App.4th 1185, 1188.)

Even were we to overlook this important procedural bar to appellant's claim that he was misadvised concerning his exposure to restitution by pleading no contest, it is patently clear that he was not prejudiced by it. First, we have noted that the only objection made by defense counsel at sentencing was to appellant's ability to pay restitution. Not one word was uttered suggesting he was misadvised concerning his exposure to restitution generally as a result of his plea. Moreover, we have already observed that appellant did not object below to the amount of restitution ordered, only that he lacked the ability to pay it. Lastly, appellant was charged with four counts, two of which were very serious, particularly in light of his three prior DUIs. Even as to the single count to which he pleaded no contest, the recommendation from the probation department was four years' state prison, and he faced significantly more prison time than that had he withdrawn his plea and gone to trial. In fact, the trial court offered appellant the opportunity to do just that at the original sentencing hearing when the judge

announced his intention to sentence appellant to state prison and not to grant probation. Given his exposure, and the strong factual case against him, it is no wonder that appellant eschewed the offer at the time sentencing was actually imposed.

On this record, we are satisfied that, even if appellant was not fully advised of the penal consequences of his guilty plea, he was not prejudiced thereby.

IV.

DISPOSITION

The judgment is affirmed.

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Ruvolo, J.

We concur:

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Kline, P.J.

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Haerle, J.